IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 05-10-2007

CORAM

THE HONOURABLE MR.JUSTICE S.PALANIVELU

CRIMINAL REVISION CASE No.611 OF 2007

Mr.U.Ravikumar,
Partner,
M/s. Andavar Solvent Oil
Products & Refiners ... Petitioner

-vs-

M/s.Foods, Fats and Fertilizers Ltd.,
rep.by its Power Agent
Mr.M.Sunder Singh ... Respondent

Petition under Section 482 of the Code of Criminal Procedure.

For petitioner : Mr.M.Abdul Razack
for Razhaq Associates

For respondent : Mr.M.J.Jaseem Mohamed

J U D G M E N T

This revision is filed against the order, dated 08.02.2007, passed by the VIII Metropolitan Magistrate, George Town, Chennai, in M.P.No.3733 of 2006 in C.C.No.4478 of 2001.

2. Petitioner is accused in the calendar case, which has been taken on file on the strength of dishonour of a cheque, allegedly delivered by the accused to the respondent. The case is in part-heard stage. The accused, pursuant to the questioning under Section 313 (1) (b) Cr.P.C., filed a petition in M.P.No.3733 of 2006 under Section 311 Cr.P.C., requesting to examine the witnesses, namely, (i) M.J.Jeseem Mohammed, counsel for the complainant, who received the amount from the accused on behalf of the complainant; (ii) Manager, Corporation Bank, Armenian Street, Chennai, and (iii) Manager, State Bank of India, Main Branch, Chennai, who issued certificates of payments. The said petition was stiffly opposed by the respondent/complainant, on the ground that examination of counsel for the complainant by defence was nothing but an

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abuse of process of law and against the provision under Section 126 of the Indian Evidence Act.

3. After hearing both the parties, the trial Court allowed the petition in part, permitting the petitioner to examine the Bank Managers and turning down the request for examination of the counsel on record for the complainant.

4. Aggrieved over the said order, the accused is before this Court by way of this revision.

5. The main stay of the contention of the petitioner is that towards the cheque amount in C.C.No.4478 of 2001 alone, he made payment by means of a banker's cheque to Mr.Jeseem Mohammed, counsel for the complainant on record, and though the complainant, in his cross-examination admitted that he received the amount through his advocate, he denied that the receipt was not towards the cheque in C.C.No.4478 of 2001.

6. On the other hand, it is contended by the learned counsel for the respondent that under Section 126 of the Indian Evidence Act, an advocate, appearing for the party, has got a privilege with regard to the intimations received by him and hence the request for examination of the counsel on record need be not entertained.

7. In this connection, it is profitable to refer Section 126 of the Indian Evidence Act, which reads as follows :

> "126.Professional Communications.- No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :
>
> Provided that nothing in this section shall protect from disclosure -
>
> (1) any such communication made in furtherance of any illegal purpose,
>
> (2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any

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> crime or fraud has been committed since the commencement of his employment.
>
> It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client."

8. Learned counsel for the petitioner would submit that the above said provision has no application to the circumstances of this case, since the advocate has received the payment from the petitioner and made an endorsement on the cheque itself towards receipt of the same, however, he has not mentioned to which account it was credited.

9. The trial Court has observed that calling of counsel for the complainant on record as a defence witness is not desirable nor is necessary to a just decision of the case and the prayer for citing the counsel on record as a defence witness is noting but dragging on the proceedings and dodging the legal standards and that a diligent perusal of questioning of the accused under Section 313 (1) (b) Cr.P.C. shows that he did not state that he paid the amount to the counsel on record and he wanted to examine the counsel as a defence witness.

10. Learned counsel for the petitioner would draw attention of this Court to a decision rendered by the Hon'ble Apex Court in C.Antony v. K.G.Raghavan Nair, 2002 (9) AD (S.C.) 0169 : 2002 ACT (S.C.) 1594, in which it is held as under :

> "7. If we examine the judgment of the two Courts below in this appeal in the light of the law laid down by this Court in the above cited cases, it is to be seen that the trial Court came to the conclusion that non-examination of advocate Vijay Kumar was fatal to the case of the complainant/respondent because it is the case of the respondent that he came to know the appellant through said Vijay Kumar and the amount in question was paid in the office of said Vijay Kumar. In such a situation, the trial Court came to the conclusion that when the appellant has set up a possible defence of having given a blank cheque to Chandrappa Panicker in regard to a chit transaction, therefore, it was necessary for the respondent complainant to have examined the said Vijay Kumar to establish the fact that Vijay Kumar indeed, persuaded the respondent to advance the cash. We also think this was a very necessary piece of evidence to establish the fact that the respondent had in fact advanced a sum of Rs.26,500/- to the appellant. From a perusal of the judgment of the High Court in this

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> regard, we find that there is absolutely no discussion on this point at all. The non-consideration of this aspect of the case by the High Court, in our opinion, runs counter to the principles laid down in the above referred judgments of this Court."

11. In the above said case, the complainant/respondent came to know the appellant through advocate Vijaya Kumar and the amount in question was paid in the office of the said Vijaya Kumar and, as per the facts of the case, it was necessary for the complainant/respondent to have examined the said Vijaya Kumar to establish the fact that Vijaya Kumar persuaded the respondent to advance the cash.

12. The Supreme Court took into consideration the role of the advocate, which he played in persuading the respondent to advance cash, and it was also to be a necessary piece of evidence to establish the fact that the respondent had, in fact, advanced the amount to the appellant. The Apex Court expressed its displeasure on the non-consideration of the point by the High Court, observing that it would be contrary to the principles laid down by the Supreme Court.

13. Learned counsel for the respondent garners support from a Full Bench decision of this Court In re C.S.Venkatachariar, A.I.R.(29) 1942 Madras 691, SPECIAL BENCH, wherein, it is held as under :

> "A person who is appearing as counsel should not give evidence as a witness. If in the course of the proceedings it is discovered that he is in a position to give evidence and it is desirable that he should do so, his proper course is to retire from the case in his professional capacity."

14. Coming to the facts of the present case, concedingly, learned counsel on record for the complaint received the amount from the accused and acknowledged receipt of the same, but, he has not mentioned, for which case, it was received. The cross-examination of P.W.1 in this regard is to the effect that the above said amount was received by his counsel for another case on the file of XIV Metropolitan Magistrate Court, which was disposed of. It is not known whether the banker's cheque referred to by the petitioner herein was produced in the other case in C.C.No.10266 of 2001 on the file of XIV Metropolitan Magistrate Court, Chennai. Had the copies of depositions and the judgment in the other case been produced before the VIII Metropolitan Magistrate for the present case, there would have been a just decision. However, the date of disposal of the other case is not mentioned herein.

15. Negligence could be attributed to both sides, for not mentioning the number of other case in the acknowledgement made on the banker's cheque. The petitioner should have insisted on the learned

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counsel to mention the number of the case in the acknowledgement and the learned counsel also owes duty to mention the case number, for which he received the amount, in his acknowledgement. Admittedly, neither of them was done. Even if the counsel on record for the complainant was examined before the Court, he might depose in line with the oral testimony of his client, namely, P.W.1. So, examining the learned counsel for the complainant ' at this stage' may not serve any purpose. Whether the examination of the counsel on record for the complainant be ordered or not, may be discussed after the plausible evidence is introduced into the records of the present case and, thereafter, if it is warranted, the petitioner may approach the Court for examination of the counsel, in which event, it is for the trial Court to decide, according to the circumstances.

16. Without producing the available evidence, namely, copies of depositions of the witnesses and the judgment in C.C.No.10266 of 2001 on the file of XIV Metropolitan Magistrate Court, Chennai, the contention that the amount was paid by the petitioner to the counsel of the complainant for this case alone cannot be countenanced. Even in the chief-examination, P.W.1, complainant, has deposed that only Rs.20,000/- was paid by the accused to him towards the case and, except the said amount, the accused did not pay any further amount and that for C.C.No.10266 of 2001, the accused paid Rs.2,50,000/-.

17. For completion of oral and documentary evidence on record in the present case, it is necessary for the petitioner to produce copies of the above said records before the VIII Metropolitan Magistrate, Chennai, and, in the absence of those records, no complete adjudication could be rendered by the said Court. In other words, in order to unearth the truth and to decide the liabilities of the parties, it is indispensable to have the materials in C.C.No.10266 of 2001 in this case.

18. Under the circumstances, this Court is left with no other option except to direct the petitioner to produce the copies of depositions of witnesses in C.C.No.10266 of 2001 on the file of XIV Metropolitan Magistrate in the present case, in which event, the learned VIII Metropolitan Magistrate may receive the same as per the procedure and, if any of the parties is aggrieved or any necessity arises for examination of any witnesses, appropriate remedy may be sought for by the parties, whereupon it is for the trial Court to grant remedy, as per the settled position of law.

19. In view of the aforesaid observation, the prayer in this petition cannot not be granted. Instead, the petitioner may seek his remedy before the trial Court, subject to the observations made in this order.

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20. Criminal Original Petition is dismissed in the above terms. Consequently, the connected Criminal M.P.No.1 of 2007 is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The VIII Metropolitan Magistrate,
George Town, Chennai.

2. -do-thro' The Chief Metropolitan Magistrate,
Egmore, Chennai.

1 cc To M/s.Razhaq Associates, Advocate, SR.61864.
1 cc To Mr.M.J.Jaseem Mohammed, Advocate, SR.61770.

CRL.R.C.No.611 OF 2007

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RVL 17.10.2007

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